LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
JAN 18 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 745

THE BOARD OF PUBLIC INSTRUCTION OF MANATEE COUNTY, FLORIDA, *et al.*,

Petitioners,

—v.—

CAROLINE HARVEST, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
DREW S. DAYS, III
10 Columbus Circle
New York, New York 10019

EARL M. JOHNSON
625 West Union Street
Jacksonville, Florida 32202

Attorneys for Respondents

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Statement	2
ARGUMENT	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:

Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969)	9
Brown v. Board of Education, 347 U.S. 483 (1954)	9
Brown v. Board of Education, 349 U.S. 294 (1955)	9
Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970)	4, 9
Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969)	3
Davis v. Board of School Commissioners of Mobile County, No. 436, O.T. 1970	11
Ellis v. Board of Public Instruction of Orange County, Florida, 423 F.2d 203 (5th Cir. 1970)	8

PAGE

Green v. County School Board, 391 U.S. 430 (1968).... 2, 9, 10, 11

Harvest v. Board of Public Instruction of Manatee County, 421 F.2d 136 (5th Cir. 1969) 3

Louisiana v. United States, 380 U.S. 145, 154 (1965).... 11

Raney v. Board of Education, 391 U.S. 443, 449 (1968) 11

Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1969)..... 3, 5

Swann v. Charlotte-Mecklenburg Board of Education, Nos. 281 and 349, O.T. 1970 11

United States v. Jefferson County Board of Education, 380 F.2d 385 (5th Cir. 1967)..... 2

Statutes:

28 U.S.C. 1254(1) 1

28 U.S.C. 2106 8

Supreme Court of the United States

IN THE

OCTOBER TERM, 1970

No. 745

THE BOARD OF PUBLIC INSTRUCTION OF MANATEE COUNTY, FLORIDA, *et al.*,

Petitioners,

—v.—

CAROLINE HARVEST, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the Court of Appeals (Pet. App. A.1) is reported at 429 F.2d 414 (5th Cir. 1970). The decision of the district court is unreported.

Jurisdiction

The decision of the Court of Appeals was entered on June 26, 1970. The petition for certiorari was filed on September 23, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

Whether the Court of Appeals was correct in ruling that the District Court did not abuse its discretion by approving an HEW-prepared plan that totally desegregated a previously dual school system.

Constitutional Provisions and Statutes Involved

Pertinent excerpts from the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1964 are set forth at pages 2-3 of the petition.

Statement

This school desegregation case was commenced in January of 1965 as a class action seeking injunctive relief against the continued operation of a dual, racially segregated school system in Manatee County, Florida. The board (petitioners herein) initially adopted a freedom of choice plan which was subsequently altered by district court decree of May 15, 1967 to comply with a then-recent decision in *United States* v. *Jefferson County Board of Education,* 380 F.2d 385 (5th Cir. 1967). In October, 1968, plaintiffs (respondents here) filed a motion for further relief in accord with this Court's decision in *Green* v. *County School Board,* 391 U.S. 430 (1968). At that time, the Manatee County school system operated 29 schools of which 5 were all-black or virtually all-black (90%—99.9% black). Seventy-six percent of black school population attended these five facilities and over 50% of the black teachers in the system taught at these all-black or virtually all-black schools.

In response to this motion, the district court required the board to submit a plan for the conversion of Manatee County schools to a unitary, non-racial system. The board's geographic zoning plan, submitted in February,

1969, left four schools—three elementary and one middle school (grades 6-8)—all-black. With respect to faculty desegregation, the board proposed to establish a minimum ratio of 51% white teachers in all schools in the system. In April, 1969 the district court rejected the board's plan to the extent that it permitted the continued existence of several all-black schools. It instructed the board to revise zone lines in order to achieve some desegregation in the three all-black elementary schools, thereby desegregating as well the all-black middle school into which the elementary schools were to feed. The board moved for a new trial which was denied in June, 1969. An appeal was taken from that denial in July, 1969; plaintiff filed a notice of cross-appeal in August, 1969. On that appeal, the board argued, in essence, that the district court erred in requiring desegregation of the four all-black schools. Plaintiffs, on the other hand, contended on cross-appeal that the lower court's order, requiring only alteration of zone lines to desegregate the four all-black schools and approving the faculty provisions, did not go far enough under existing constitutional doctrines. In December, 1969, the court of appeals, acting on the cross-appeal, reversed and remanded the order of the district court for compliance with the requirements of its decision in *Singleton* v. *Jackson Municipal Separate School District,* 419 F.2d 1211 (5th Cir. 1969). It found that the plan proposed by the school board and later amended by the district court did not establish a racially unitary school system. *Harvest* v. *Board of Public Instruction of Manatee County,* 421 F.2d 136 (5th Cir. 1969). On January 7, 1970, in response to a motion by plaintiffs, the court of appeals recalled and amended its mandate to conform with the decision of this Court in *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 226 (1969).

On January 26, 1970, subsequent to this Court's decision in *Carter* v. *West Feliciana Parish School Board,* 326 U.S. 290 (1970), the district court held a hearing in order to consider alternative plans of desegregation—three formulated by the Florida School Desegregation Consulting Center (H.E.W.), two formulated by the board, and one other plan presented to the court by intervenors.

The three plans presented to the court by H.E.W. were denominated as Plans A, B, and C, all directed in differing degrees toward achieving desegregation of three virtually all-black elementary schools, one all-black middle school, and with achieving faculty desegregation so that all schools in the system had ratios of black to white teachers in accordance with the ratio of black to white teachers employed in the system as a whole. Plan A recommended the pairing of each of the three predominantly black elementaries with three adjacent, predominantly white schools. The effects of the implementation of Plan A would be, according to the H.E.W. report, to decrease the percentage of black students in the three black elementaries from 98.3% to 65.6%, from 98.2% to 60.4% and from 100% to 66.5%, respectively. The second alternative, Plan B, involved the clustering of the three black elementaries respectively with separate groups of three, four and two adjacent predominantly white elementaries. The implementation of Plan B would have the effect of reducing the percentage of black students in the first black elementary from 98.2% to 17.8%, in the second elementary from 98.3% to 36.2%, and in the third elementary from 100% to 24.4%. The final plan prepared by H.E.W., Plan C, recommended pairing one black school with an adjacent predominantly white school, and clustering the second and third black elementaries with two adjacent predominantly white schools each. Under this plan the third black elementary would serve as a fifth and sixth grade center for

all children in its zone, in the second black school's zone and in the zones of the white schools with which they were clustered (six schools in all). Plan C would reduce the percentage of black students in the three black elementaries from 98.2% to 38.9%, from 98.3% to 48.9% and from 100% to 49.3% respectively. All three plans presented to the court by H.E.W. contained identical recommendations for desegregating the all-black middle school and for faculty desegregation. H.E.W. recommended pairing the all-black middle schools with a nearby predominantly white middle school. And it proposed the achievement of the system-wide ratio of black and white faculty in each school in the county.

In addition to the plans submitted by H.E.W., two other plans, denominated No. 1 and No. 2, were presented by the board for the court's consideration. Plan No. 1 was a classic freedom-of-choice plan. Plan No. 2 envisioned a partial implementation of H.E.W.'s Plan C. Students would spend one-half their day in the schools to which they were already assigned and the other half in the schools to which they would be assigned under Plan C. The last of the six plans submitted to the court, that of intervenors, was a modified freedom-of-choice plan in which any child might select any school to attend, school officials were to urge students to transfer and notify their parents of this right to do so, and all students electing to transfer were to be provided with transportation. Like the plans submitted by H.E.W. and the board, faculties were to be desegregated according to a system-wide formula. In the "Notification of Compliance" filed on January 26, 1970, to which frequent reference is made in the petition (pp. 4-5), the board indicated that it had met the requirements of *Singleton, supra,* with regard to faculty desegregation and, on that basis alone, sought the dis-

trict court's approval of the Manatee County school system as unitary.

In its order of January 29, 1970, prior to the ruling on the alternative plans of desegregation submitted to it, the district court found with regard to the Manatee County school system that:

> As to faculty, the system is not unitary. Teachers are not assigned so that the percentage of black teachers at each school is substantially the percentage of black teachers throughout the system at that level, as is required by *Singleton*. As to students, the system is unitary as to secondary schools, with the exception of Lincoln Middle School, which is all-black. The elementary schools are segregated; it is the elementary schools which most fall short of the law of the land and which account overwhelmingly for Manatee's status as a dual system. Three elementary schools (Bradenton, Memorial and Tillman) are virtually all-black. Ten elementary schools (Anna Maria, Duette, Myakka, Bayshore, Daughtrey, Ellenton, Miller, Palma Sola, Prine, Samoset) are virtually all-white. (Petition A. 7)

Turning to a consideration of the alternative plans of desegregation recommended by H.E.W., the district court rejected alternative Plan A and alternative Plan C. The court indicated in rejecting Plan A that its result would be to increase unconscionably the percentage of black students at presently desegregated schools and to decrease inadequately the percentage in predominantly black schools leading, therefore, inevitably to resegregation. Plan C was rejected by the court first, because many schools continued as all-white facilities, secondly, because under such a plan the percentage of black students in already desegregated

predominantly white schools would be altered so as to invite resegregation and, finally, because the predominantly black schools would not be satisfactorily desegregated.

With regard to the plans proposed by the board, the court rejected Plan No. 1 because freedom-of-choice had traditionally failed to disestablish dual systems and because such methods shifted the affirmative duty of abolishing the dual system from the shoulders of the school boards, where it belonged, to the students and their parents. Plan No. 2 was rejected by the court for the same reasons that H.E.W.'s Plan C was rejected. The plan submitted by the intervenors was rejected on the same grounds given by the court for rejecting the board's Plan No. 1. Having considered five of the six plans presented to it, the district court indicated its approval of Plan B, stating as follows:

> Plan B effectively desegregates Manatee County schools and establishes a unitary system as to students. All but three elementaries, all of which are distantly located, are effectively integrated and the nature of the desegregation is such that no resegregation will result. (Petition A. 5)

As to the desegregation of the all-black middle school, the court accepted the H.E.W. proposal of pairing it with a nearby predominantly white middle school as the only way to end its segregated status. On the matter of faculty desegregation, the board was ordered to assign teachers so that the faculty composition of each and every school contained a ratio of black to white teachers substantially the same as the ratio of black to white teachers in the school system as a whole at the educational level. The board was ordered to implement Plan B on or before April 6, 1970 to establish a unitary system in Manatee County.

On February 24, 1970, the board filed notice of appeal, seeking review of the district court's January 29, 1970 order. No stay was granted pending appeal. However, as a result of several ancillary proceedings in the district court, the court of appeals and this Court involving opposition by the Governor of Florida to the proposed desegregation of Manatee County schools,[1] Plan B was implemented on April 13, 1970, one week later than the deadline required by the lower court's order.

By order of April 15, 1970, the court of appeals, acting pursuant to 28 U.S.C.A. § 2106, directed the district court to supplement its findings of fact in the instant case with respect to the following matters: (1) the present racial composition of the student population in every school in Manatee County school system; (2) the number of white students who could be assigned to the predominantly black schools if an *Ellis*[2] type neighborhood assignment plan were implemented in Manatee County; (3) maps showing location of each school in the system and the attendance area served; (4) a description of the school transportation system; (5) a description of present or proposed construction or expansion of school facilities; and (6) the existence of a bi-racial advisory committee. After hearing both parties and permitting them to file proposed findings of fact, the district court submitted its supplemental findings of fact on April 24, 1970.

On June 26, 1970, the 5th Circuit unanimously affirmed the district court's ruling stating:

---

[1] Details of these proceedings can be found at 425 F.2d 1224 (5th Cir. 1970), 90 S. Ct. 1254 (1970) and 312 F. Supp. 269 (M.D. Fla., 1970).

[2] *Ellis* v. *Board of Public Instruction of Orange County, Fla.*, 423 F.2d 203 (5th Cir. 1970).

> The issue on this appeal is not whether the district court selected the best possible plan for unitizing the Manatee County School System but rather whether that court abused its discretion by adopting an unworkable plan or one based on an incorrect legal standard [citations omitted]. Expressed in other terms the appellate question is: Did the district court invoke a remedy so extreme as to constitute an abuse of its discretion? However put, the answer clearly is: No. (Petition A. 1-2).

In affirming, the court of appeals indicated that its action was "without prejudice to further consideration by the district court of the present student assignment plan in light of the experience gained since its implementation." (Petition A. 2). In accordance with this directive, the lower court has subsequently approved two board-suggested modifications of Plan B in orders of August 24, 1970 and January 4, 1971.

ARGUMENT

Petitioners seek review by this Court of the same issue presented to the Court below, namely, whether the district court abused its discretion by ordering a plan implemented that totally desegregated a formerly dual school system. The district court was obligated by rulings of this Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955), *Green* v. *County School Board, supra, Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969) and *Carter* v. *West Feliciana Parish School Board*, 326 U.S. 290 (1970) to disestablish immediately the dual school system in Manatee County.

Specifically, *Green, supra* established that:

> The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan

> in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. 391 U.S. 430, 439

In accordance with this responsibility, the district court considered three plans prepared by educational experts from an H.E.W. Center, two plans prepared by the board and one other prepared by intervenors to determine which plan would most effectively disestablish the dual school system in Manatee County. Notable vestiges of the dual system were four all-black schools and continuing segregation of faculty.

The court's rejection of the two fredom-of-choice plans proposed by the board and by intervenors was clearly in line with this Court's holdings in *Green, supra.* Nor did it act improperly in disapproving the half-and-half modification proposed by the board of H.E.W. Plan C. After evaluating the three remaining plans, the court chose Plan B as the most effective since it clearly reduced to the lowest level the percentage of black children in the formerly all-back schools. Plan B, contrary to petitioners' assertions, was prepared by educational experts who considered it as a feasible and workable plan of desegregation. H.E.W. preferred Plan C to Plan B solely because it regarded the latter as "more extensive than necessary and would meet with

considerable adverse community reaction." In reviewing the district court's order, the court of appeals found nothing to indicate that Plan B was infeasible or unworkable. To the extent that petitioners claim that the courts below erred in considering the prospects of resegregation in order to determine the most feasible plan, that argument is foreclosed as well by decision of this Court. Since *Brown II, supra,* this Court has pressed district courts to exercise their broad powers in order to eliminate segregated schools "root and branch" and has declared that a district court has not only the power, but in fact "the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Green, supra,* at 438; *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965); and *Raney* v. *Board of Education,* 391 U.S. 443, 449 (1968). *Green, supra,* indicated that the question of desegregation must be assessed by the district court "in light of the circumstances present" in each case. The district court was not clearly in error in viewing resegregation as one of the circumstances that should be considered in this case to evaluate the relative effectiveness of the plans presented to it. Petitioners present no argument to establish that the requirements of *Green, supra* were violated in any way. Since the principles established by this Court in the *Green* case dispose of the only significant issue raised by the record in this case, the petition for a writ of certiorari should be denied.

Insofar as petitioners seek review of the questions of racial balance and busing which they contend are raised by this record, this Court presently has before it two cases, *Swann* v. *Charlotte-Mecklenburg Board of Education,* Nos. 281 and 349, this Term, and *Davis* v. *Board of School Commissioners of Mobile County,* No. 436, this term, in which those issues have already been extensively briefed and

argued. To the extent that decisions in those cases may affect the issues decided in this case, appropriate motions for supplemental relief or modification may be presented to the courts below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
DREW S. DAYS, III
10 Columbus Circle
New York, New York 10019

EARL M. JOHNSON
625 West Union Street
Jacksonville, Florida 32202

Attorneys for Respondents